BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAURA MUMAW	)	
Claimant	)	
VS.	)	
	)	Docket No. 258,787
FARMERS UNION CO-OP BUSINESS ASSOC.	)	
Respondent	)	
AND	)	
	)	
FARMLAND MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the January 27, 2003 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) heard oral argument on July 23, 2003. Gary M. Peterson of Topeka, Kansas, was appointed and served as Board Member Pro Tem for this claim.[1]

APPEARANCES

Paul D. Post of Topeka, Kansas, appeared for the claimant. Jeffrey E. King of Salina, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties stipulated that effective March 1, 2002, claimant's fringe benefits were discontinued. Consistent with this agreement and pursuant to K.S.A. 44-511 (Furse 1993), claimant's average weekly wage would then increase from $341.62 (without fringe benefits) to $429.55.

[1] On March 31, 2003, Mr. Peterson retired from the Board. But at the time of oral argument a new Board Member had not been appointed. Accordingly, Mr. Peterson was appointed as Board Member Pro Tem for this claim.

ISSUES

The ALJ found claimant sustained a 15 percent permanent partial functional impairment to her neck attributable to her April 27, 2000 accident. The ALJ declined to award any work disability benefits as he concluded that claimant either voluntarily left work without good cause or she sustained an intervening accident in June 2001. The ALJ also authorized the payment of various unpaid medical bills, including those to Dr. David Bradley Jones, up to October 4, 2001, while rejecting the assertion that other bills should be paid.

The claimant requests review of the ALJ's Award alleging she is entitled to not only a higher functional impairment but also to an 87.5 percent work disability.

Respondent and its insurance carrier argue the ALJ's findings should be affirmed in all respects, and to include the parties' recent stipulation regarding the average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a general receptionist and sales clerk. On April 27, 2000, claimant suffered an accidental injury while assisting a customer in loading several rolls of barbed wire. According to claimant, these rolls weighed 83 pounds each. She testified that after lifting the rolls, she felt pain in her neck, right behind her rib cage and in her back. She described "little electric shocks going in my back and up into my neck."[2]

On May 1, 2000, claimant was referred to the local clinic where she was seen by Dr. David Bradley Jones, a local physician who is in general practice and is not an orthopaedist. When Dr. Jones saw claimant she voiced complaints of upper back strain/pain type symptoms with some pain going up into her neck. Dr. Jones observed upper back spasms this first time he saw her although her range of motion in her neck and shoulders was good. Dr. Jones treated her conservatively but ultimately referred claimant to Dr. Craig Yorke for further evaluation. Dr. Yorke recommended and performed a C4-5 diskectomy and fusion in July 2000. According to claimant, she asked to be released from Dr. Yorke's care as of November 2000. He assigned her a 10-pound lifting restriction at that time.

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[2] R.H. Trans. at 13-14.

In November 2000 claimant returned to work and was able to perform most of her regular duties within the 10-pound weight restriction, albeit with some discomfort. She requested and was allowed to bring a heating pad so that she could use that on her back to minimize her pain complaints. She was also encouraged to avoid any lifting and to ask for help anytime she required assistance.

In addition, in November 2000 claimant was directed to Dr. Geoffrey L. Blatt, a board-certified neurosurgeon, for a second opinion regarding her ongoing complaints. Dr. Blatt recorded all of claimant's complaints during the course of the examination. These included dizzy spells, blurred vision, sensitivity to light in the right eye, tinnitus, and chest pain. He observed claimant's behavior as dramatic and pronounced during the examination. He testified she moved slowly, frequently holding her neck and head and he believed she was overemphasizing her pain.

Dr. Blatt performed an examination and found her deep tendon reflexes to be normal along with intact cranial nerves. Claimant had good motor strength and had no radiculopathy. She was alert and oriented but demonstrated sensory abnormalities that did not follow any known dermatomal pattern. Following this examination, Dr. Blatt concluded he could not explain all of claimant's complaints nor attribute them to any one specific problem. He believed that her fusion may not have healed and recommended she wear a cervical collar for a period of time. Dr. Blatt released claimant to return to work and assigned a five-pound lifting limit. He also suggested she not sit more than 30 minutes at a time and to avoid crawling and climbing, all the while maintaining a neutral neck position.

Claimant continued working uneventfully until June 2001 when she describes two separate events. The first incident involved a supervisor tossing a dust mask onto her desk. Claimant testified she was startled by this event and it caused her to twist her neck quickly. Claimant again sought treatment from Dr. Jones and his office note indicates claimant reported her condition was stable until this event occurred at work. Immediately following the event she felt an acute onset of increased neck and back pain with tingling going into both her hands.

Although the record indicates claimant did not work after this date she also reports a second event occurring at work near the end of June 2001. At the regular hearing she testified she was bending down towards a truck to hand a set of tickets to a customer when she fell, striking a scale.[3] Claimant sought treatment from Dr. Jones and according to claimant, she was told she should remain at home.[4] Dr. Jones provided a series of off-work slips and claimant has not returned to work since she last worked for respondent. At

[3] R.H. Trans. at 32-33, 70.

[4] *Id*. at 36.

claimant's request he also provided her a work release that directed her not to drive in excess of 10 minutes at a time.

Claimant continued to have ongoing complaints and received medical attention from Dr. Jones. He prescribed medications for claimant's pain complaints and he ultimately suspected that her fusion had not healed. During the trial of this matter Dr. Jones became quite vocal about his view that claimant's treatment by the insurer and Dr. Blatt was less than adequate and failed to meet the standard of care, particularly with regard to addressing her pain complaints.

In November 2001, claimant was again seen by Dr. Blatt, pursuant to an order by the ALJ. The physical examination was essentially the same as in 2000. Again, claimant vocalized such bizarre complaints and symptoms that Dr. Blatt could provide no rational medical explanation. At times, when Dr. Blatt attempted to palpate the muscles, she would literally cry out in pain.

Dr. Blatt was no longer concerned about the possibility of a non-union but, nonetheless, he asked for a second MRI to be done in the hopes of identifying an alternative diagnosis. The MRI revealed additional desiccation of disks in the neck along with degenerative changes at several levels but overall, these changes were, in his view, normal for someone of claimant's age and wholly failed to explain her current complaints. He found no reason to prohibit her from working and in fact concluded that a large part of her current complaints were psychological. Dr. Blatt offered no further treatment recommendations and released her from treatment in November 2001.

At this point claimant had been off work since June 2001. Claimant contacted respondent in early November 2001 and advised she did not feel she could return to work even though she had been released by Dr. Blatt, the treating physician. The respondent placed claimant on Family Medical Leave and notified her the period would expire on February 22, 2002.

Claimant was evaluated by Dr. Peter Bieri at her counsel's request in January 2002. During this examination, Dr. Bieri encountered some of the same difficulties experienced by Dr. Blatt. He was able to identify subjective complaints but no objective deficits. Claimant reported her June 2001 fall to Dr. Bieri but he had no other information regarding the events of her last month of work. Dr. Bieri assessed a 15 percent functional impairment along with an additional 10 percent left upper extremity functional impairment due to what he called the residuals of cervical radiculopathy. However, his examination failed to document any objective evidence of such residuals and was limited to only subjective complaints.

At the ALJ's direction, claimant was examined by Dr. Vito Carabetta on April 30, 2002. During this evaluation claimant did not disclose any subsequent events to Dr. Carabetta other than the April 27, 2000 accident. Much like Dr. Blatt, Dr. Carabetta had

difficulty trying to explain the claimant's symptoms and her complaints relative to her injury. He suspected claimant's pain symptoms may be due to a rheumatological or connective tissue disorder. However, this is based upon his observation of the skin on claimant's back which bears an unusual discoloration. Some physicians have opined that it was due to a burn from a heating pad. Dr. Carabetta rejected that explanation and strongly suggested that a rheumatologist or dermatologist would need to investigate that particular component of claimant's complaints.

Dr. Carabetta further testified that claimant embellishes her symptoms, probably unconsciously. He stopped short of saying she was deceptive. He indicated she significantly self-limited her movements during the examination. Moreover, he indicated claimant was a less than exact historian in that her descriptions of her physical problems were less than helpful. For example, she describes her spine feeling "like a piece of licorice."[5]

Dr. Carabetta assigned a 15 percent permanent partial impairment to the body as a whole as a result of the April 2000 accident pursuant to the *Guides* (4th ed.).[6] This 15 percent reflects a finding that claimant's symptoms classify her injury as falling within the DRE Category III impairment and recognizes the fact that she has had surgery and by definition, previously must have had radiculopathy. He subsequently issued restrictions that limited claimant's overhead lifting to no more than 25 pounds and only then on an occasional basis. She is to avoid any sudden awkward movement and awkward posture to her head and neck.

In February 2002 claimant contacted Sandra Dern, respondent's office manager. Claimant indicated she wanted to return to work but advised she couldn't drive the five miles from her home to work. She later provided Ms. Dern with a note from Dr. Jones which restricted not only her driving but limited her head and neck movements and her lifting to 10 pounds on a frequent basis and 20 pounds on an occasional basis. Claimant failed to advise respondent that Dr. Blatt had released her without any significant restrictions. Also, Dr. Carabetta later provided restrictions that were less prohibitive than those outlined by Dr. Jones. In fact, Dr. Carabetta did not preclude claimant from driving, although he conceded that she would likely be uncomfortable doing so for any length of time.

Claimant's supervisor testified that respondent could have accommodated Dr. Carabetta's restrictions. In fact, the evidence contained within the record supports respondent's contention that it could have accommodated claimant. After she returned to work in November 2000, she returned to the same job and any lifting on her part (or for any

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[5] Carabetta Depo. at 6; *Id.*, Ex. 2 at 3.

[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

woman in respondent's employ) was, according to Ms. Dern and Barrie Toburen, claimant's direct supervisor, strongly discouraged. Other employees were available to do any unauthorized lifting. However, respondent never offered claimant an accommodated job after receiving Dr. Carabetta's restrictions. But neither did claimant return to respondent and request a job within Dr. Carabetta's restrictions.

This case is complicated by the fact that claimant sought the support and advice of a woman named Sharon Coffman. Ms. Coffman is claimant's husband's cousin and a physical therapist who specializes in cardiopulmonary problems. She accompanied claimant on her visit to see Dr. Blatt in November 2000 and voiced no significant complaints regarding claimant's care. However, she suggested that if claimant was displeased with a physician's treatment, specifically Dr. Yorke, she should ask to be released and seek treatment elsewhere. This evidence, coupled with the opinions expressed by Drs. Carabetta and Blatt significantly called into question claimant's veracity and/or her sincerity. The ALJ even commented that "[t]he picture that has emerged of the Claimant is one of a person who objectively has minimal physical problems, but who chooses to pathologically focus on and exaggerate the extent of her pain. Objectively there is no medical reason why she should not be working, or why she should have significant work restrictions."[7]

Because claimant was alleging an entitlement to work disability benefits, evidence was offered as to claimant's task and wage losses. Claimant has not worked since she left respondent's employ in June 2001. While she has prepared a resume and produced a list of potential employers with whom she says she sought employment from March 2002 up until the time of the regular hearing, all of her efforts were made via mail save one application she filed on the computer. She has not filled out any applications nor has she made any in-person visits to potential employers. There is no evidence she registered with any employment agency or job service center. The ALJ was not persuaded that claimant's efforts constituted "good faith" as required by Kansas law.[8]

Karen Crist Terrill testified claimant was able to make $6 to $6.50 per hour based upon her current abilities. Monty Longacre testified similarly and suggested she could make $5.50 an hour. However, Mr. Longacre testified that the market for such jobs is not significant and that such a position would be difficult to find, particularly given claimant's driving limitations.

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[7] Award (Jan. 27, 2003) at 4.

[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Both these individuals also offered a task analysis. Ms. Terrill identified 48 non-duplicative tasks, distilling claimant's work activities down to precise tasks. In contrast, Mr. Longacre identified a total of 16 tasks.

When asked to comment on the task loss, Dr. Jones opined that claimant had lost the ability to perform 12 of the 16 unduplicated tasks outlined by Monty Longacre. Dr. Carabetta testified claimant had lost 10 of the 16 tasks (again based on Mr. Longacre's analysis) and lost a total of 11 of 48 tasks (based on Ms. Terrill's report). Dr. Bieri suggested claimant had lost 12 of 16 tasks (based upon Mr. Longacre's analysis).

The ALJ concluded he did not need to address the work disability analysis as he found as follows:

> The Court is faced with two scenarios. In the first scenario there was no intervening accident [in June 2001]. If this is correct, then given the lack of any increase in the Claimant's functional impairment and the lack of any visible anatomic change, the Claimant's leaving work and never returning is inexplicable. Therefore the conclusion must be that she left work without good cause, and therefore is not entitled to a work disability.[9]
>
> The second scenario is that there was an intervening accident, that the damage caused by the incidents in June 2001 produced a dramatic and permanent increase in the Claimant's pain, necessitating the seeking of further treatment, and preventing the Claimant from working again. Had the Claimant gone to work for a different employer and then these incidents had occurred the Court could easily find that she had suffered an aggravation of a preexisting condition. This Court has jurisdiction only to enter an award for an accident of April 27, 2000. As the Claimant returned to work following that accident, there would be no work disability. Therefore the Claimant would be limited to a functional impairment.[10]

The fact that the ALJ would come to this conclusion should not have come as a surprise to claimant or her counsel. At a preliminary hearing held on October 3, 2001, when claimant was requesting further evaluation and medical treatment, she described the June 2001 events that led to her decision to leave work. According to the Award, the ALJ advised counsel during that hearing and in his Order that the evidence suggested there had been an intervening accident in June 2001. Claimant was advised to file another claim. The ALJ's Order stated, "[a]s there is an allegation of an intervening work accident,

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[9] The Claimant has made minimal efforts to find employment. Her efforts have been limited to mailing out resumes but not filling out actual job applications. The Court does not find this to constitute a good faith effort to find employment, and that a wage would be imputed to her.

[10] Award (Jan. 27, 2003) at 5-6.

and the Claimant will file a claim for that alleged accident, this hearing is continued so that both claims may be heard together."[11]

After reviewing the record and hearing statements of counsel, the Board finds the ALJ's conclusions with regard to the existence of an intervening accident(s) in June 2001 are well-reasoned and factually substantiated by the medical records and claimant's own testimony. The events of June 2001 certainly caused claimant to suffer an acute onset of increased pain. She sought treatment from Dr. Jones and described the event when her supervisor startled her. He testified that this event caused her to jump which resulted in an increase in symptomatology, exacerbating her prior symptoms.[12] According to Dr. Jones, the MRI taken in November 2001, after her subsequent accident, documents the permanent advancement of her pre-existing spine disease. Such evidence supports a claim of an intervening accident. Up until that time claimant was working for respondent at her accommodated job making the same wages she earned prior to her work-related injury of April 2000. To the extent claimant left work in June 2001, the evidence indicates it was more probably true than not, that it was due to the injury that took place during that month for which the ALJ and the Board have no jurisdiction.

Accordingly, the Board affirms the ALJ's finding that claimant sustained a 15 percent functional impairment to the body as a whole as a result of her April 27, 2000 work-related injury.

As for the average weekly wage, the parties agreed at oral argument that the pre-injury average weekly wage was $341.62 and increased to $429.55 as of March 1, 2002. Accordingly, the Award will be modified to reflect this agreement.

The ALJ awarded claimant the payment of certain medical bills while disallowing others. The Board finds no reason to modify this aspect of the Award.

The Board adopts the remaining findings and conclusions set forth in the January 27, 2003 Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 27, 2003, is affirmed in part and modified in part:

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[11] Order (Oct. 4, 2001).

[12] Jones Depo. at 17-18.

Laura Mumaw is granted compensation from Farmers Union Co-op Business Assoc. and its insurance carrier for an April 27, 2000 accident and resulting disability. Based upon an average weekly wage of $341.62, Ms. Mumaw is entitled to receive 24.86 weeks of temporary total disability benefits at $227.76 per week, or $5,662.11, plus 60.77 weeks of permanent partial general disability benefits at $227.76 per week, or $13,840.98, for a 15 percent permanent partial general disability, making a total award of $19,503.09, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Attorney for Claimant
Jeffrey E. King, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director